

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 MICHEL KECK 4:21-CV-00430

5 VS. HOUSTON, TEXAS

6
7 MIX CREATIVE LEARNING CENTER,
8 LLC, ET AL FEBRUARY 3, 2022

9
10 TRANSCRIPT OF MOTION PROCEEDINGS HELD REMOTELY
11 HEARD BEFORE THE HONORABLE KEITH P. ELLISON
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 FOR THE PLAINTIFF: MR. MATHEW KIDMAN HIGBEE
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25 Proceedings recorded by mechanical stenography,
transcript produced via computer.

THE COURT: I didn't hear all the appearances. This is Keith Ellison.

MR. HIGBEE: Good afternoon, Your Honor. This is Mathew Higbee for plaintiff Michel Keck.

For Mix Creative Learning Center?

THE COURT: Are we ready to begin, or are we going to wait for Mr. Garcia?

(Brief pause in the proceedings.)

THE COURT: Welcome, Mr. Garcia.

We're here on Defendants' Motion to Dismiss Plaintiff's First Amended Complaint or in the Alternative Motion for More Definite Statement.

Would anybody like to add anything to what's in the papers?

1 MR. GARCIA: Your Honor, this is Roland Garcia on
2 behalf of the defendants and I am here prepared to make
3 argument, but I do think our papers have adequately stated it,
4 but I'm happy to elaborate if you have any questions.

03:30PM

5 THE COURT: No. No need for that.

6 Does plaintiff wish to say anything?

7 MR. HIGBEE: No, Your Honor.

8 THE COURT: Okay. To maintain a claim for copyright
9 infringement, the plaintiff must show -- (Inaudible.)

10 THE COURT REPORTER: Judge, this is the court reporter;
11 and you are cutting out. I can barely hear you.

12 THE COURT: Is this any better?

13 THE COURT REPORTER: That's perfect. Thank you.

03:31PM

14 THE COURT: District courts are generally not required
15 in the pleadings to include a copy of the copyright
16 registration and deposit materials. Most courts have found
17 pleadings to be sufficient.

18 Is there something different about this case that
19 makes the pleadings insufficient?

03:31PM

20 MR. GARCIA: Yes, Your Honor, there is. I could
21 elaborate briefly.

22 THE COURT: Why don't you tell me about that then.

23 MR. GARCIA: Yes, Your Honor.

03:31PM

24 I understand well the concept that the pleadings
25 are to be taken as true and that's the problem here because

1 when you take the plaintiff's pleadings as true and they say
2 that attached to their amended complaint as Exhibit A is, in
3 fact, a true and correct copy of the registered copyright
4 material, we had no choice but to look at that because they
03:31PM 5 refused to produce to us the actual deposited material so we
6 rely on that and you look at that and it doesn't match their
7 allegation of what was registered and thus infringement.

8 And so we do think it is a good motion. We
9 pointed this out twice now. We pointed it out in our original
03:32PM 10 motion. They then amended, but their amendment didn't correct
11 it and they even doubled down.

12 So we filed our amended motion to dismiss,
13 Your Honor. And what they argue as copyrighted material are
14 some art pieces that have a registered mark on them. They've
03:32PM 15 identified the registered mark to be the words "Michel Keck"
16 and then they say, "Attached are their true and correct
17 copyrights."

18 Well, the works that we used, none of them have
19 that exact mark on them and not in the right place that's
03:33PM 20 alleged where they would be. And so you take that as true, as
21 they say themselves, that it must be taken as true because they
22 refused to give us the deposits, then we've not -- there's been
23 no copyright infringement.

24 And you know, my clients acted in good faith.
03:33PM 25 There's really what we're talking about are six alleged uses of

1 the alleged copyright. There's six art kits, two of them
2 bought by the plaintiff herself, I guess, to build up the
3 claim. And at most it was \$240 of sales. My client stopped
4 immediately when the accusation was made.

03:33PM

5 THE COURT: I'm concerned about that myself,
6 Mr. Garcia. It does seem like the penalties in this case may
7 be disproportionate to the offense, but that's not today's
8 issue precisely.

03:34PM

9 MR. GARCIA: That's right, Judge. So that's why this
10 case is a little different than your typical, you take the
11 allegation of a copyright at face value; but here where the
12 allegation doesn't match the infringement, we had a right to
13 say, "Well, can you show me your deposit?"

14 They said, "Sure," and now they refuse.

03:34PM

15 And so we believe the motion is good and on the
16 face of the pleadings, it's not a plausible claim.

17 Thank you, Judge.

18 THE COURT: Let me get the plaintiff's response.

19 MR. HIGBEE: Thank you, Your Honor.

03:34PM

20 Obviously we disagree and I think respectfully
21 Mr. Garcia is maybe conflating two unrelated allegations in the
22 complaint. I just want to briefly address the claim that we're
23 refusing to provide anything and I think we mentioned it just
24 briefly in a footnote in our motion, but the registration
25 process itself takes place only online. The person goes on,

03:35PM

1 they click through the screens, they submit an uploaded digital
2 file. It goes off to the Copyright Office; and then if the
3 registering party requests it, then a paper certificate is
4 issued.

03:35PM 5 No deposit copy is returned to the registering
6 party. You know, to the extent that someone wants to get a
7 copy of one, they can go to the Copyright Office. And having
8 done it myself numerous times, the Copyright Office will
9 literally just FedEx you a CD with files on it. It's not like
03:35PM 10 there's some official embossed paperwork with the copyright on
11 it.

12 THE COURT: Let me ask, have you refused the
13 defendants' request to produce anything?

14 MR. HIGBEE: Well, Your Honor, there hasn't been any
03:36PM 15 formal discovery. We had stated --

16 THE COURT: I don't think we ought to insist on that.
17 For the basic information, Rule 26 ought to cover this.

18 MR. HIGBEE: Right, Your Honor.

19 And we've produced the registration numbers. The
03:36PM 20 exhibits in the complaint are the images that are registered,
21 and I'll address Mr. Garcia's second concern in a moment.

22 So essentially, you know, we would just say,
23 "Look at Exhibit A. Here it is. This is what's registered,
24 right?"

03:36PM 25 The second concern that I'm hearing Mr. Garcia

1 say is that there's an allegation in the complaint about a
2 trademarked signature that Ms. Keck uses. That's completely
3 different. We have a separate claim for trademark infringement
4 than we do for copyright infringement.

03:36PM 5 We're not saying and we've never said in the
6 pleadings or anywhere else that the deposited material contains
7 the trademark on it -- the deposited material from the
8 copyright rather contains the trademark on it.

03:37PM 9 What we're saying is that Ms. Keck has applied
10 for and been granted a copyright registration in these works of
11 art and that completely separately, she has applied for a
12 trademark in her name for goods and services and that in
13 commerce when she distributes these things, she combines the
14 two. We're not saying that the trademark appears on the
03:37PM 15 copyrighted work as it was registered.

16 So I think that's where the confusion lies,
17 right? And, you know, because a trademark and a copyright,
18 those are two completely separate things. So to Mr. Garcia's
19 point of, well, they're saying that this is a true and correct
03:37PM 20 thing, but it doesn't have the trademark on it, well, you know,
21 there's no requirement that a copyright registration also
22 include a trademark. Those are two separate things.

23 And the final point that I'll make, Your Honor,
24 is that Rule 8 is very clear that it just needs to be a short
03:38PM 25 and plain statement that the complaining party is entitled to

1 relief. All it says is "statement." It doesn't even require
2 that there be any exhibits or anything like that. We obviously
3 added them here because we think --

4 THE COURT: You say you've not refused to produce
5 anything?

6 MR. HIGBEE: Well, my point, Your Honor, is, you know,
7 if I were to e-mail the files that Mr. Garcia is requesting, it
8 would literally just be Exhibit A to the complaint and say here
9 are the six.

10 THE COURT: Are you saying that everything that he's
11 requested, you've already produced?

12 MR. HIGBEE: Yes. And I would say, you know, look at
13 Paragraph 17 and that will tell you exactly what the
14 registration numbers are because that's all my client has.

15 The Copyright Office does not return any type of
16 anything that is a quote, unquote deposit copy. The
17 Copyright Office maintains that at the Library of Congress. If
18 someone wants one, they can pay a fee and they can request it
19 to verify, I guess, that that is what's registered under that
20 certificate if there's any type of question over that.

21 THE COURT: Mr. Garcia, is that responsive at all to
22 your concerns?

23 MR. GARCIA: You know, Judge, he didn't answer your
24 question and here is why -- and you've asked it twice.

25 And that is that during the course of this -- and

1 I know it's not relevant to the motion; but because we were
2 trying to evaluate this demand, I said, "Well, golly, can you
3 show me your copyright and can you show me your deposits so we
4 can evaluate this?"

03:39PM

5 And he said, "Sure. We will send it to you."

6 That's why filed in the court records,
7 Your Honor, are, I think, two or three unopposed motions for
8 extension of time for us to respond because he was gathering it
9 from his client -- the deposit material and the licensing and
10 damage material.

03:40PM

11 And as Your Honor points out, I'm entitled to
12 have that up front.

13 And so he was -- and then finally he decided, you
14 know, I'm not going to give it to you. If you want it, you've
15 got to go to the Copyright Office and request it, blah, blah,
16 blah, which is now what he's telling you.

03:40PM

17 So that's point one. I never got the deposit
18 material. He's saying for the first time on the phone here,
19 well, if he was to give it to me it would just be recopying
20 what's Exhibit A to his amended complaint.

03:40PM

21 Okay. Well, now let's talk about that, Judge.
22 And that is that he's arguing that Paragraph 17 of his amended
23 complaint is the sufficient brief description. It is not.
24 It's copyright numbers, alleged registration numbers.

03:41PM

25 But Paragraph 15 of his amended complaint is

1 really important because it says: "True and correct copies of
2 Keck's works are attached hereto as Exhibit A."

3 So then I have no choice but to presume, and I
4 guess it's now admitted, is that you go to Exhibit A for what
03:41PM 5 actually is deposited, the registered work.

6 You go to the registered work then. It doesn't
7 match -- the allegation doesn't match because they say in
8 paragraph -- right here they say in Paragraph 20 that it is her
9 custom and practice to affix her registered mark to each of her
03:41PM 10 works, most typically the bottom right-hand corner.

11 Okay. You take that as true since they won't
12 give me the deposit and then you look at what is in Exhibit A,
13 it doesn't match that.

14 So it's a motion on what they're now admitting
03:42PM 15 are the deposit and we believe it is a good motion and so they
16 haven't produced the deposit. They want me to go to the
17 Copyright Office and pay money to get it myself. And so it
18 looks like now all we've got to do is look at Exhibit A.

19 So we stand on the motion, Judge. We think it's
03:42PM 20 good. And they've now had two opportunities to fix this, and
21 they haven't done it.

22 So we still move to dismiss, Your Honor.

23 MR. HIGBEE: May I respond, Your Honor?

24 THE COURT: Yes, Mr. Higbee.

03:42PM 25 MR. HIGBEE: Thank you.

1 We have explained to Mr. Garcia that our client,
2 because the Copyright Office does not return deposited
3 materials, that there is no quote, unquote deposit copy that my
4 client has.

03:43PM 5 She can send over the exact same files that she
6 sent to the Copyright Office and Mr. Garcia will probably raise
7 the exact same issues -- "How do we know that this is the
8 deposited copy," right?

9 THE COURT: Well, but I think you ought to produce
03:43PM 10 them; but we can argue about duplicity and redundancy and all
11 that later, but I don't know why you can't produce them.

12 MR. HIGBEE: Certainly, Your Honor. And I apologize
13 if, you know, we were sounding like we're saying, "Oh, we're
14 never going to produce this" or anything.

03:43PM 15 Our point is just, you know -- certainly I can
16 have someone from my office e-mail it over today, but it's
17 going to be Exhibit A.

18 And, again, just to repeat the point, there's a
19 conflating of the copyright and the trademark, right? It is
03:43PM 20 Ms. Keck's practice to affix her trademarked signature to her
21 paintings. That does not mean and it does not say anywhere in
22 the complaint that she has affixed her signature, her trademark
23 signature, to the copies that were deposited. It just says
24 that she registered these works to issue these certificates and
03:44PM 25 then when she goes out and puts them into commerce, she puts

1 her trademark on them, right?

2 So the fact that Exhibit A doesn't have the
3 trademark on it, I don't think leads to the conclusion that
4 there's some type of fatal error to the allegations.

03:44PM

5 THE COURT: The copyrighted material doesn't have to
6 have a trademark, but I think the other side is entitled to
7 whatever you have and they may have a different
8 characterization of what it is.

03:44PM

9 MR. HIGBEE: Sure. And I think our point, Your Honor,
10 was just explain to the defense counsel multiple times that if
11 they want to verify that this is what was actually registered
12 rather than taking our word for it, rather than looking at
13 what's in the complaint, which they clearly have issues with
14 and they're entitled to have issues, the only way they can
15 verify that is to go to the Copyright Office and order that
16 deposit copy.

03:45PM

17 There's no record that my client has from the
18 Copyright Office that shows that this particular painting was
19 deposited with this specific --

03:45PM

20 THE COURT: Have you communicated that in the letter to
21 Mr. Garcia's office then?

22 MR. HIGBEE: I believe we have in e-mails, Your Honor.

23 THE COURT: Well, I tell you what. I'm not going to
24 grant the dismissal today. I'm going to give you seven days to
25 exchange the documents we've talked about, Mr. Higbee. And if

03:45PM

1 either party then -- if either party wants more time with the
2 Court, you can notify us and we'll get you heard promptly.

3 But for now, the motion to dismiss is denied
4 without prejudice.

5 MR. HIGBEE: Thank you, Your Honor.

6 THE COURT: Thank you very much.

7 MR. GARCIA: Thank you, Judge.

8 (The proceedings were adjourned.)

9 * * * *

10 REPORTER'S CERTIFICATE

11 I, Lanie M. Smith, CSR, RMR, CRR, Official
12 Court Reporter, United States District Court, Southern District
13 of Texas, do hereby certify that the foregoing is a true and
14 correct transcript, to the best of my ability and
understanding, from the record of the proceedings in the
above-entitled and numbered matter.

15 /s/ Lanie M. Smith
16 Official Court Reporter
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